IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No. 163 of 2003

For Approval and Signature:

HONOURABLE MR.JUSTICE P.B.MAJMUDAR

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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NAVED S KADRI – THRO' P.O.A. TARIK NIZAMODDIN SAIYED
Versus
MUSTAK MOHAMAD MANSURI AND OTHERS

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Appearance :
MR AJ PATEL for the Appellant
RULE SERVED for Respondents Nos.1 and 2
None for Respondent No. 3
MR SAURABH G AMIN for Respondent No.4

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CORAM : HONOURABLE MR.JUSTICE P.B.MAJMUDAR

Date : 27/11/2006

ORAL JUDGMENT

By way of filing this appeal from order under Order 43 Rule 1 of the Civil Procedure Code the appellant – original defendant No.2 of Special Civil Suit No.241 of 2003 has challenged the judgment and order passed by the learned City Civil Court, Ahmedabad below interim injunction application by which the learned Judge has partly allowed the interim injunction application submitted by respondent No.1 who is the original plaintiff of that suit and the original defendants Nos.1, 2 and 3 are directed to maintain the status quo regarding title as well as possession of the suit property. Respondent no.1 herein instituted the aforesaid suit which is a suit for declaration and injunction. The case of the plaintiff in the said suit is that there is a cooperative society in the city of Ahmedabad, namely, Saffrony Cooperative Housing Society and that one of the flats on the third floor which was constructed by the said Society is allotted to the plaintiff by the said Society. The description of the same is given in paragraph 1 of the plaintiff. It is the case of the plaintiff that defendant No.2 of the suit (i.e. the present appellant) has tried to obtain certain documents in collusion with defendant No.1 and that the said fact came to his knowledge on making enquiry from the society. It is the case of the plaintiff that he is in physical possession of the flat in question and that the construction, which was carried out by defendant No.1 is illegal and even Ahmedabad Municipal Corporation is joined as defendant No.4. It is averred in the plaint that the construction carried out by defendant No.1 is contrary to the building rules and regulations, though no specific prayer is made against the Corporation in the prayer clause of the plaint. It is the case of the plaintiff that by obtaining the loan he has purchased the suit property and that he has made full payment to defendant No.1 and he has been handed over the documents of possession, etc. which have been

deposited by him with Housing Finance company from which he has taken loan and he was granted loan of Rs.5 lakhs. It is the case of the plaintiff that even though he was allotted the flat but the possession has not been handed over on the ground that some minor works are pending. It is the say of the plaintiff that defendant No.1 who had undertaken the task of constructing the flats on behalf of the Society and who has been given the development agreement by the Society has illegally transacted with defendants Nos.2 and 3 and that on enquiry the plaintiff found that in the record of the Society the name of defendant No.2 is entered as owner and occupier but actual and physical possession of the same is with defendant No.3. It is also the say of the plaintiff that the transactions, if any, entered into by defendant No.1 with defendant No.2 are illegal and they maybe declared as null and void. In paragraph 12 of the plaint it is averred that defendant No.3 is residing with family members in the flat in question. It is alleged that defendant No.1 is a fraudulent person. It is clearly averred in the plaint as well as in injunction application that the defendant No.3 is occupying possession of the flat in question and that he is residing in the flat since many years with his family members. The suit is accordingly filed for a declaration as well as for permanent injunction against the defendants of the said suit. As per the cause of action mentioned in the plaint for filing of the suit, the same arose at the time when the plaintiff entered into agreement with defendant No.2 for allotment of the flat in question as well as by entering into agreement for possession as well as at the time when the loan was taken by the plaintiff from some financial institutions. In the aforesaid suit injunction application was pressed into service to the effect that defendants may be restrained from entering into any transaction in connection with the suit flats and for restraining them from transferring the suit property to any one during the pendency of the suit.

The aforesaid suit was resisted by the defendants on various grounds. So far as the appellant is concerned, as pointed out earlier, he is original defendant No.2 in the suit. According to defendant No.2 , the said flat in question is allotted to him by giving the share certificate by cooperative society, namely, Saffrony Cooperative Housing Society Limited. It is the say of the present appellant – original defendant No.2 in the said that he is the owner of the suit property and he has legal title over the suit property. It is also his say that the suit is filed by the plaintiff in collusion with defendant No.3. It is also the say of the defendant No.2 that he has paid full consideration and consequently the so called documents and share certificates are already handed over to him and even possession letter is handed over to him and money receipt is given to him by the Society. He therefore submitted that the injunction application deserves to be rejected. The original defendant No.1 has not filed any written statement before the trial Court. So far as original defendant No.3 is concerned, he has filed his written statement at Exhibit 24 wherein he has taken the stand that he has paid the full consideration and he is the real allottee of the flat and he is in physical possession of the flat in question. It is the say of defendant No.3 that he is in actual possession of the suit property. In his written statement he has also pointed out that some proceedings are pending before the Board of Nominees Court under Section 96 of the Gujarat Cooperative Societies Act, 1961. It is his case that the Board of Nominee has rejected the application for injunction in his absence and that Board of Nominees has rejected his prayer for injunction in his absence by dismissing the same for default against which the appeal is pending before the Cooperative Tribunal. In short, the say of defendant No.3 is that he is in physical possession of the flat in question and, therefore, no injunction can be granted against him.

The learned trial Judge after hearing the concerned parties and after considering the prima facie evidence on record partly allowed the said application for injunction by which the plaintiff as well as defendant No.3 are directed to maintain status quo for title as well as possession of the suit property. For passing the said order the Court has taken into consideration the Court Commissioner's report. Being aggrieved by the aforesaid order of the learned trial Judge below Notice of Motition application Exhibit 7 in the aforesaid Civil Suit No.241 of 2003, the appellant – original defendant No.2 has preferred this appeal from order under Order 43 Rule 1 of the Civil Procedure Code.

Mr AJ Patel has vehemently submitted that the aforesaid suit is filed by the plaintiff in collusion with defendant No.3, who had already instituted the proceedings under Section 96 of the Gujarat Cooperative Societies Act, 1961 before the Board of Nominees and prayed for interim injunction against dispossession. Having failed in his attempt to get injunction from the aforesaid Court, defendant no.3 got filed the second suit through the present plaintiff. He submitted that the present suit is nothing but an abuse of process of law as defendant No.3 having failed to get any injunction from the Board of Nominees Court has virtually succeeded in getting the injunction from the Civil Court by which the trial Court has directed the parties to maintain status quo. He submitted that even on the principle of judicial comity when one Court has refused to grant injunction, in a subsequent suit the Court should not have granted injunction though, apparently, a show has been created that the latter suit is an independent suit and by the said order virtually the possession of the defendant No.3 is protected. In this connection, certain relevant aspects are required to be taken into account. The original defendant No.3 – Yasufbhai A Shaikh instituted the proceedings

before the Board of Nominees Court by resorting to Section 96 of the Gujarat Cooperative Societies Act.

Since defendant No.3 herein was asserting his right about possession as well as title over the suit property flat, he instituted the said suit against the society wherein he has joined the present appellant as a party to the said proceedings. In the said suit, which was numbered as Arbitration Case No.1769 of 2001 an application at Exhibit 6 was pressed into service for interim injunction wherein defendant No.3 had prayed that injunction maybe granted restraining the Society and others from disturbing his possession in connection with the suit flat. The order on injunction application passed by the Nominees Court is produced in the compilation. It is pointed by Mr A.J.Patel that the said order is also produced in the trial Court In the aforesaid suit the society, namely, Saffrony Cooperative Housing Society Limited submitted its reply and Society took the stand that the aforesaid plaintiff (present respondent No.3 – original Defendant No.3 in the suit) was never enrolled as a member of the Society and the flat is allotted from the beginning to the present appellant and he is the first allottee of the said flat. The society also took the stand before the aforesaid Court that said Naved S Kadri (the present appellant) has already taken possession and has applied his locks but he has not occupied the physical possession as he had gone to reside in foreign country and taking disadvantage of his absence the plaintiff had broke open the lock of the said flat and took possession of the flat. The Board of Nominees Court after considering the evidence on record at the time of deciding interim injunction application came to the conclusion that the plaintiff of the said suit had no valid title at all and that there is nothing to show that the plaintiff was enrolled as a member of the said cooperative society. Considering the aforesaid aspect, the Board of Nominees Court rejected the prayer for interim injunction

submitted by the plaintiff of that suit. Thereafter, it seems that in the final hearing the suit was dismissed for default as the plaintiff of that case has never remained present. The plaintiff of that suit thereafter filed an application for restoring the matter but the trial Court came to the conclusion that no satisfactory reasons were given and, therefore, the prayer for restoring the suit was rejected against which the plaintiff of that suit has preferred revision application. However, the said revision application was withdrawn as per the order of the revisional court, which is at page no.19 in the compilation. Mr Patel submitted that the said revision was withdrawn in view of the fact that the present suit was filed by the plaintiff and obtained injunction and therefore naturally the interest of respondent No.3 was protected in view of the ad interim injunction and, therefore, he had withdrawn the revision application. It is required to be noted that notice below injunction application in the present suit is issued and the revision application was thereafter withdrawn on 7th March 2003. The present suit is filed by the present plaintiff in order to protect the interest of defendant No.3. It is required to be noted that respondent No.3 instituted the suit before the Board of Nominees and injunction application was pressed into service before that Court and while rejeting the injunction application the Nominees Court has given reasons as to why injunction cannot be granted. It was found by the aforesaid Court that the said plaintiff, who is respondent No.3 herein has failed to establish his title in his favour regarding the suit property nor there is anything to show that the Society has enrolled him as a member. While deciding the interim injunction application the trial Court found that certain articles were found to be in the premises but it is not possible to say that he was in physical possession. Even otherwise, in the aforesaid suit the cooperative society had already taken the stand that it had never allotted the flat in question to defendant No.3 of the present suit, who was

original plaintiff and that share certificate is issued in favour of the present appellant, who was one of the defendants in that suit and that he had put up his lock but since he was residing in another country, defendant No.3 took advantage of his absence and broke open the lock and started residing there. It is required to be noted that considering the nature of the injunction granted by the trial Court it is clear that by virtue of the order of status quo granted by the trial Court the defendant No.3 is able to protect his possession even though he has lost before the Court of Board of Nominees. The learned trial Judge has not at all considered the aforesaid aspect while deciding the injunction application. Even otherwise, on the principle of judicial comity when a competent Court under Section 96 of the Gujarat Cooperative Societies Act, 1961 has refused to grant injunction, in a subsequent suit the Court should not have passed contradictory order granting injunction which benefits defendant No.3. It is also required to be noted that the plaintiff has not even joined the aforesaid cooperative society as a party to the present proceedings as necessary material was already in possession of the society, which was already produced before the Nominees Court in the earlier proceedings instituted by defendant No.3 herein. The trial Court has, therefore, virtually granted injunction which benefits defendant No.3 though defendant No.3 has failed to obtain any injunction as pointed out earlier. Even if the original defendant No.1 who might have been engaged by the Society for constructing the building or to whom the Society might have given the development agreement has taken some money from the present plaintiff, it would not constitute any valid right, title in favour of the plaintiff of this suit. If the aforesaid defendant No.1 of the present suit has cheated the present plaintiff in any manner, the plaintiff can certainly take appropriate steps against the aforesaid person in accordance with law. But, certainly, such transactions cannot bind the cooperative society which has already

allotted the share certificate as well as possession of the flat in question to the present appellant. Looking to the operative part of the order of the trial Court it is clear that the parties are ordered to maintain the status quo of the suit property, which would mean that defendant No.3 will be entitled to retain the possession though he has failed to obtain such injunction in the earlier proceedings which were pending before the Registrar's Board of Nominees Court. It is required to be noted that as per the say of the cooperative society in the earlier proceedings, the defendant No.3 who was serving as Police Inspector had took away the possession of the flat by breaking open the lock. Even in the present suit the Commissioner's Report might be showing his possession but the same cannot be said to be any favourable point for protecting the possession of the defendant No.3. Similarly, even if the plaintiff has taken any loan or any amount from any financial institutions for purchasing the flat in question, the plaintiff is required to prove that the share certificate is handed over to him by the Society and the Society has allotted the flat to him. The plaintiff has not jointed the Society, which is a necessary party in the present suit. The net effect of the injunction order is that defendant No.3 is permitted to continue with the possession. The trial Court has not considered aforesaid aspect of the matter and more weightage is given to the Court Commissioner's Report. Even otherwise, once a prayer of similar nature has been rejected by a competent court, in a suit instituted by respondent No.3, on the basis of principles of judicial propriety no order of granting injunction could have been passed. Even the observation of the learned trial Judge in paragraph 12 deals with the payment made by defendant No.3 to the Society. In the present suit the Court was not required to adjudicate the dispute between the Society and defendant No.3 and, therefore, the observations of the learned trial Judge are contrary to law and as pointed out earlier it can safely be said that the present suit is filed by

the plaintiff at the behest of the defendant No.3 who is virtually the beneficiary of the injunction order. Prima facie, it appears that filing of the present suit is nothing but an abuse of process of law and the learned Judge should not have granted interim injunction. Even without joining the cooperative housing society, the prayer for injunction was not required to be considered at all. It is pointed out by Mr Patel that at the time when the matter is admitted the order of the trial Court is stayed by this Court by passing order in Civil Application and that interim order is made absolute during the pendency of this appeal by the order of the learned Single Judge dated 1.8.2003, which was passed after hearing the concerned parties. Considering all these aspects of the matter, the order of the trial Court is not sustainable and hence the same is set aside. The judgment and order passed by the learned City Civil Court, Ahmedabad below interim injunction application in Special Civil Suit No.241 of 2003 is set aside. Injunction application filed by the original plaintiff stands dismissed. As stated earlier, if the plaintiff has got any grievance against defendant No.1, he can take steps against him independently and in accordance with law. This Appeal from Order is accordingly allowed with no order as to costs.

(P.B.MAJMUDAR, J.)

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